No. 3542

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

DAVID JAMES FLYNN, BARBARA FLYNN, and JOHN FLYNN, infants, by their guardian and prochain ami, HONORA DELLA FLYNN, HONORA DELLA FLYNN,

Appellants,

vs.

E. A. CHRISTENSON, HANS J. LUNVALDT, CHARLES E. SUDDEN, J. H. BAXTER, A. TAVIERA, W. B. GODFREY, JR., F. M. DELANO, WALTER V. ROHLFFS, R. L. ANDERSON, GEO. F. QUIGLEY, D. W. C. TIETJEN, CECELIA F. SUDDEN, HENRY BROOKS, R. Y. TAYLOR, ROBERT SUDDEN, JAS. JOHNSON CO. (a corporation), ALBERT ROWE, J. J. STAIGER, EDMUND JACOBS, R. C. SUDDEN, GEO. JOHNSON, JOHN L. HUBBARD, H. PILTZ, LOUIS POOLE,

Appellees.

BRIEF FOR APPELLANTS.

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Proctors for Appellants.

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BRIEF FOR APPELLANTS.

I. STATEMENT OF THE CASE.

A. The Facts.

Defendants are the joint owners of the lumber schooner "Sophie Christenson"; libelants are the widow

and children of James Flynn, a longshoreman employed by and killed on board of the schooner, and they sue for damages suffered by the loss of husband and father.

On August 3, 1903, the schooner was lying in the port of San Pedro, discharging a cargo of lumber. She lay portside to the wharf, with a list to port created intentionally for the purpose of causing the cargo-gaff, after the load was attached, to swing out to the wharf. The cargo loads were placed in a rope-sling with an eye at each end; one end of the rope was placed around the load, then drawn through the eye at the other end, and the free eye was put on the hook of the donkey-fall hanging from the end of the cargo-gaff. Two sailors on deck, on the starboard side of the main hatch, had made up a slingload of large timbers, called mining timbers; this load was hoisted up by means of the donkey engine, then lowered and swung out across the deck to the wharf. Instead of lowering it all the way down to the wharf, the donkeyman "held on", in consequence of which one end of the dangling load struck the railing of the wharf, and the shock caused some of the pieces to fall out of the load into the water, between the wharf and the schooner's side. James Flynn and a sailor named Soderquist had been engaged in making up slingloads on the port side of the schooner, between the mizzen and main masts. While the particular load was first hoisted up and swung across the deck and was then lowered to the wharf, they stepped back from under the path of the load to a position aft of the mizzen mast;

but after the load had cleared the deck, they resumed their work of making up the next load to be discharged. When the pieces fell out of the load into the water between the schooner and the wharf, the gaff, with the lightened load, *swung back* to the deck, and all the remaining pieces slipped out of the sling, striking both Flynn and his mate. The blow was received by Flynn on the back of his head, causing his death.

B. The Findings and Conclusions of the Lower Court.

(a) The lower court held that the respondents were negligent in providing rope slings of insufficient length for the proper discharge of the lumber, viz.: slings which were only long enough for a single turn; that this use with only a single turn was extra hazardous, and that the accident would not have occurred if the double turn had been employed.

(b) The lower court also held that the deceased was chargeable with a want of due care, and accordingly divided the loss suffered by libelants between libelants and respondents.

(c) The court, in its first decision, found the loss suffered by libelants to be the amount of $20,000, but reduced this amount, in the later decision, to $13,000, without new evidence intervening. Accordingly, in the first decision, the court awarded libelants upon the basis of $10,000, but reduced this amount, in the later decision, to $6500. The court also held that the action had abated as to certain respondents whose death had been suggested to the court, which reduces the total amount

of the recovery from the respondents to the sum of $3757.72.

C. The Final Decree.

The final decree signed by the court runs against each living respondent severally for his proportionate share in the vessel. The result is that libelants could recover, under the decree, small amounts from each of sixteen respondents, the total sum recoverable being $3757.72, as damages for the loss suffered by the death of husband and father.

D. The Questions Raised by this Appeal.

1. Whether the lower court was justified, on the facts, in holding the deceased chargeable with a want of due care, and dividing the damages on this ground.
2. Whether the lower court was justified in reducing the amount of the loss suffered by libelants from $20,000 to $13,000.
3. Whether the lower court was justified in further reducing the award to libelants by making the decree against each living respondent severally for his proportionate share in the vessel.

II. SPECIFICATION OF ERRORS RELIED UPON.

The detailed specifications are contained in the Assignment of Errors (200).* They may be epitomized as follows:

First. Neither the findings of fact, by the court, nor the evidence, support a conclusion that the de-

*Figures in parenthesis refer to pages of Apostles.

ceased contributed to the accident by his own want of care;

Second. The court erred in reducing the amount of the loss suffered by libelants from $20,000 to $13,000;

Third. The decree should have been made for the full amount of the damages against the surviving respondents in solido.

Fourth. If not, then the decree should have been made against each living respondent severally for his proportion of the full amount of the damages which his individual share in the vessel bears to thirty-seven sixty-fourths.

Fifth. In the cases of respondents, E. A. Christenson and Hans J. Lunvaldt, managing owner and master, respectively, of the schooner, the decree should be made for the full amount of the damages awarded to libelants.

III. BRIEF OF THE ARGUMENT.

Appellants appreciate that, having been granted an award for the loss suffered by the death of the mainstay of their family, they were successful in a measure and that they are taking certain chances in bringing this case up on appeal; but they appear here persuaded that Judge Dietrich, had the limited time at his disposal for the hearing of their cause made this possible, would himself ultimately have come to a conclusion more favorable to their cause, and convinced that this

court, upon a review of the facts of this case, will find that the husband and father, who lost his life while working for the support of his family in a naturally hazardous occupation, should not be stigmatized with the charge that he had an equal share in causing his own death with those who were clearly indifferent to his safety; especially where this charge is coupled with the fact that the desire to save the time of his employers, the zeal for *their* interest, was the only motive that could have actuated him in going back one fatal moment too soon, to the spot where he must perform his labors and which had now become a danger spot. This widow, and these children of the deceased, now grown up, feel that while the demands of charity might be formally satisfied by the meager award decreed, the widow at least should receive an adequate compensation for the years of struggle caused by the fault of those well able to respond to the demands of justice.

First: The Charge of Contributory Negligence.

The *findings* of the lower court, which have a bearing on the question, are:

(1) There was but a single peril, the slipping of timbers from the load (189).

(2) It was possible for him to be on guard until the load swung on to the wharf in harmony with the practice followed by some of his fellow employees (189).

(3) The long timbers slipped out *after* the load had reached the wharf railing (189). When the bundle

struck the railing of the wharf, some of the shorter pieces were shaken out and thus the size of the bundle was reduced—and from the partially open loop thus left the other pieces, by one of which the deceased was struck, easily escaped (188).

(4) That this was a casualty which is not shown by the evidence to be of frequent occurrence (189).

The court made the following *conclusions*:

(1) (Expressly): That it was his duty to exercise care commensurate with the degree of peril.

(2) (Expressly): That it was incumbent upon him, in the exercise of due care, to keep a lookout until danger was passed (189).

(3) (Impliedly): That the deceased was chargeable with a want of due care (190).

The implied conclusion can only be sustained upon the basis of an implied finding that the deceased did *not* exercise care commensurate with the degree of peril, and did not keep a lookout until danger was passed. If the evidence shows that he did so keep a lookout, then there is no ground for the implied conclusion that the deceased was chargeable with contributory negligence.

We contend:

(a) The express *findings* of the court are not only consistent with, but corroborative of, the assumption of the exercise of due care by the deceased.

(b) The implied finding that the deceased did not exercise due care is manifestly contrary to the *evidence*.

A. The findings.

The court found that the trouble began "*after* the load had reached the wharf railing," in other words, after the load had passed over and beyond the place where the deceased and his mate were working on deck. Unless it could be reasonably expected that the load would come back in the natural course of events, the danger of pieces dropping from the load upon the deceased was then passed. After the load had swung on to the wharf, it was not expected to return to the vessel. Clearly the deceased had then a right to expect that the load would not swing back from the wharf to the deck of the vessel, and, in fact, it could not have swung back but for the additional negligence of respondents in failing to provide the proper equipment to keep the load on the wharf after it had once swung out. The court found that the slipping of the long timbers, in this instance, was "a casualty which is not shown by the evidence to be of frequent occurrence" (189). Therefore, it was not a casualty to be expected by the deceased. His duty extended only to the exercise of care commensurate with the degree of perils to be expected, not to the anticipation of a peril which did occur, but which could not be expected. Neither the danger of long timbers slipping out *after the load had reached the wharf railing,* nor the danger of the partial load swinging back over the deck and eventually dropping out entirely were such dangers as made it incumbent upon the deceased to keep a lookout. His duty to stand back and remain back, or keep a lookout, had ceased after the load had left the

deck and reached the wharf railing; this duty applied to the period of time while the load was being hoisted up from the starboard side, was swung athwartship to and beyond the port side, and was thence lowered to the wharf; after the load had swung beyond the ship and passed to the wharf railing, the duty to keep a lookout had ended. His duty to keep a lookout was then superseded by a new duty to the employer, viz., to go back to his place and make up the next slingload.

B. The evidence.

The evidence shows positively that the deceased in fact kept a lookout until all dangers which he was bound to anticipate were passed.

The particular load which slipped out of the sling and caused the death of the deceased consisted of mining lumber, "12 by 12s, and I suppose 20 pieces in it" (Master, for the defense, 180), and in length it ran from 10 to 24 feet (130). It was made up by seamen Ehlert and Cainan, on the starboard side of the main hatch (86). When the sling, after one turn around the load, was hooked on to the boom-tackle, the mate gave a signal and the load was hoisted up by the man at the donkey engine, at a slant. When at sufficient height, the mate gave another signal, and the load was lowered by the donkeyman. At the same time the gaff and the load hanging from its free end swung out towards the wharf, on account of the list of the vessel towards the wharf. Up to this time "everybody was out of the way, all walked away, and the load swung into the wharf" (Master, 180). The evidence shows that the

deceased did stand back while the load was going up. On this point the testimony is as follows:

Nillson, donkeyman, as witness for *respondents,* testified:

"Q. Do you know whether or not the man had stood clear when the mate called out, and went back again to his work?

A. I don't know that.

Q. You do not know?

A. I don't know that" (26).

Lungvalt, master, as witness for *respondents,* testified:

"Q. Did you see the accident? A. I did" (180).

"*Everybody was out of the way, all walked away,* and the load *swung in to the wharf.* * * * Mr. Flynn, the man that got hurt, had gone back, he was warned to get away and *he was away, he was between the poop and the mizzenmast,* but he went back again; nobody told him to go back; he went back on his own account" (180).

"Every man generally looks out for the load and looks after it until it is clear or gets landed, and then the men go to work again" (184).

On Cross-Examination

"Q. Did you see the lumber when it struck Mr. Flynn?

A. I did.

Q. You stated, did you not, that it came back from the wharf?

A. *Yes, it swung off the wharf* and a piece fell out; it stood on end this way, and the other end hit Mr. Flynn right in the head" (184 and 185).

Buckley, foreman of the lumber company to which the lumber was delivered, and who had charge of the

receiving of the lumber and placing it on the wharf (130), testified:

"Q. What is customary?

A. They will *see the load leave*—they *start it toward its destination*—then follow their regular work" (141).

Nillson, donkeyman, witness for *respondents,* testified:

"Q. And if he had to stand clear while one load left until it got on to the wharf, he would have to quit work until it is done?

A. If he sees it is a dangerous load.

Q. But if he does not see it is a dangerous load, he is expected to go on working, making up another load? A. Yes, sir.

Q. He is working where the lumber is?

A. Yes, the spot where the load is going up there; he has to be there all the time.

Q. He is not expected to stand clear, and does not stand clear, unless he sees it is a dangerous load?

A. The mate has his eye on the load, and when he sees anything wrong, he sings out" (37).

Ehlert, the man who made up the fatal load, called for libelants, testified on cross-examination:

"Q. Did you hear anybody call out to stand clear when your load went up?

A. Yes, sir; not when the load went up, but when the load fell. That is the time they sang out to stand clear, but it was too late then.

Q. It was too late then? A. Yes, sir.

Q. You are sure no one said to stand clear until the load fell? A. That is right" (92).

Nillson, the donkeyman, testified:

"I was heaving up a load of lumber, and when I got the load up high enough, the gaff was hang-

ing out a little, so *she came over the wharf life.* While she was hanging so * * * hanging over the rail like * * * a few pieces—I don't know how many—six or seven of those short planks fell out, and they fell right between, into the water. * * * Just after a little while those planks that were left, they fell off the sling and fell in the same direction that man was at work'' (25).

Ehlert testified:

> ''*When the load came back,* it hit the stringer on the wharf because the ship was lower than the stringer * * * and it shook it, and half of it fell out between the ship's side. There were three planks left, and the gaff swung inside because there was nothing to hold it on the wharf. The gaff *swung in,* and the planks, what was left, fell between the ship's side and the wharf; three planks were left and they *swung in* and killed him'' (78).

Lungvaldt, master, explains the cause of the return of the load from the wharf to the deck as follows:

> ''When it came into the wharf *the donkeyman did not let it go;* he could have let it go, but *he kind of held on, and the load swung back''* (180) .

Cainan, the other man who made up the fatal sling-load, testified:

> ''Q. How many gaffs were used in discharging?
> A. One, sir.
> Q. Whereabouts was that gaff located?
> A. It was resting on the mainmast, sir * * * (40).
> Q. After the load struck the stringer of the wharf, what happened then?
> A. It shook the load, and some pieces fell down between the ship and the wharf, and the *remaining three pieces swung aboard,* and one piece struck this man Flynn. * * * He was just lifting a big piece of timber so as for another man to put the

block under the piece of timber so as to allow the sling to go underneath * * *'' (46).

Q. Whereabouts on the deck was he at that time?

A. He was more near to the mizzenmast'' (47).

On cross-examination by Mr. Frank this witness testified:

''Q. Now, as I understand you, *this had passed clear over the vessel and over to the wharf, and then struck the wharf,* and most of the load fell in between the wharf and the vessel into the water?

A. Most of the load fell between the wharf and the vessel's side.

Q. When this was swung over, what were you doing?

A. I was looking at it. We generally look to see that it *goes clear of the ship''* (64).

Baker, tallyman on the wharf, testified:

''Q. Do you know whether the load did swing back in this case—being unloaded at the time Mr. Flynn was killed?

A. I do not know whether I was in the back or the front—I am not sure—*but I am sure it swung back''* (115).

On cross-examination by Mr. Frank this witness testified:

''Q. Do you know whether or not any slingload other than this one, if this one did swing back, swung back on the vessel?

A. You want to know if any other slingloads beside this one that I think swung back?

Q. Yes. A. No, I do not remember.

Q. And as a matter of fact, you don't know whether this one swung back, except that you judged that it did?

A. To the best of my recollection I judge it swung back'' (121).

All of the testimony cited was given by deposition, except the testimony of the master, who was called by respondents, and testified in open court. It is significant that respondents did not take the testimony of the mate whose business it was to superintend the work of discharge; undoubtedly he could have thrown light upon the details of the transaction and, if the defense of contributory negligence on the part of James Flynn could be supported by evidence, would be naturally the best witness whom the respondents would have called; for it would have been his interest to support the charge of negligence against the deceased in order to exonerate himself from the corresponding charge.

The testimony cited shows without conflict: First. That the load first swung out over the vessel to the wharf without any mishap; that while it swung out "everybody was out of the way, all walked away. * * * Mr. Flynn had gone back; * * * he was away; *he was between the poop and the mizzenmast*" (the master); Second, that when he was hit by the piece of lumber falling out of the sling, he was between the main mast and the mizzenmast, more near to the mizzenmast," and had just stooped over to lift a big piece of timber (Cainan); third, that between the time when he was between the poop and the mizzenmast and the time when the timber fell on him, he had gone back again to his place of work with Soderquist to make up the next load with him (the master); fourth, that before he went back, the slingload had "swung in to the wharf;" that "when it came in to the wharf, the donkeyman didn't let it go, but he kind of held on" (the

master); that the end of the load struck against the wharf and thereupon part of the load fell out; that the load, thus lightened and loosened, *returned* to the deck and, when the remaining pieces fell out, one of them struck the deceased a fatal blow, and injured his mate slightly. The evidence clearly supports the finding of the court that the long timbers slipped out "*after* the load had reached the wharf railing, a casualty which is not shown by the evidence to be of frequent occurrence," a casualty, therefore, which it was *not* his duty to guard against. It is easy to conjecture what the consequences would have been had the crew and longshoremen not promptly returned to their work after the load had swung out to the wharf and the usual dangers had thus passed. The danger which caused the death of James Flynn and the injury to his mate was not the danger which might have been anticipated, viz., the danger of small pieces dropping out of the load while it was swinging across the deck, but the unusual danger arising in consequence of the failure of the donkeyman to lower the load properly and the consequent collision of the load with the deck stringer—a *new* danger not to be anticipated and which indeed could easily have been avoided, had the owners performed their duty of providing the equipment (by Spanish burton or other contrivance) to keep the load out on the wharf after it had once reached that position.

The record shows, therefore, that the findings of the court below are consistent with the conclusion that the deceased kept a proper lookout until dangers to be ex-

pected had passed, and therefore did not contribute to the fatality; and also that the evidence, without any contradiction which we are able to discover, points affirmatively to the same conclusion.

Another consideration pointing in the same direction is the following:

Had the deceased returned to his place of work before the load swinging across the vessel to the wharf had actually reached the wharf, nay, had he never stepped aside or kept a lookout (neither of which suppositions is supported by the evidence), the negligence thus assumed on his part would have continued only to the moment when the load reached the wharf and not to the moment when he was struck down; and was not contemporaneous and concurrent with the negligence of respondents. The assumed antecedent negligence of the deceased would not be a contributory cause of his death, but the negligence of respondents, continuing and intervening between this assumed negligence of the deceased and the accident, would still be the sole proximate cause of his death. His assumed negligence in returning to his place of work too promptly would have terminated after the load had swung out to the wharf; the fatal injuries could and would still have been avoided but for the later and supervening negligence of the owners in failing to provide the proper equipment for keeping the load from returning to the vessel after it had struck against the wharf. The respondents had the "last clear chance" to prevent the injury to the deceased.

Indeed, this defense of contributory negligence bears a cynical character in this case. Such a defense may be properly expected in cases of accident and resulting injury arising out of acts independent of the employment, while the deceased pursues solely his own pleasure or convenience. In the case at bar the deceased was not bent upon his own pleasure or convenience; he was engaged in the performance of a hazardous duty imposed upon him by his employers. These employers now argue: He was too zealous in the performance of his duties; he should not have gone to work so promptly; his rare diligence constitutes negligence and excuses or extenuates our fault. What would have been the feelings of James Flynn if, on his deathbed, he had realized the force of this cold-blooded argument—that the value of his life to the widow and orphans should, by the law of the land, be cut down by one-half because, forsooth, he was so good a workman, so faithful to his employers, so devoted to their interest?

Second: The Loss Suffered by Libelants.

In the original decision, on April 16, the court found that, in the death of the husband and father, the libelants suffered a loss of $20,000.

In the modified decision, on May 1, the court found that libelants' loss was $13,000. No new evidence had been presented in the interval. The amount of damages in cases of this nature is to a large extent "a matter of judgment, touching which there is room for wide difference of opinion." The court below discussed the

general principles governing this matter very ably in the second memorandum decision; but it is respectfully submitted that all the principles and authorities discussed therein (192, 193) tend to show that the court had *not* erred in fixing the libelants' loss at the larger amount, and that the contentions made by respondents, between April 16 and May 1, that the original amount was excessive, were not sound. The rule contended for by respondents, viz., that the standard of damages recognized by the courts of the State of California should be adopted, leads to the following results:

In the *Catlin* case (31 Cal. App. 597), deceased was a carpenter's helper, 44 years old, earning $2.75 per day. He left a widow and four children. His life expectancy was 25 years. The jury returned a verdict for $17,000, and the court held this not to be excessive.

In the *McGrory* case (22 Cal. App. 671), deceased was a butcher, 25 years old, earning $20 per week. He left a widow and infant daughter. Life expectancy 38 years. The verdict was for $20,000, and the court held this not to be excessive.

In the case of *Morgan v. Southern Pacific Co.*, 95 Cal. 501, a verdict of $15,000 for personal injuries to a woman was held not to be excessive.

Deceased, in the instant case, was 42 years of age, and left a widow and three minor children, aged ten, six and four years.

Third: The Decree Should Be for the Full Amount of the Damages Against the Respondents in Solido.

That vessel owners are liable in solido for the torts of the vessel incurred in the natural course of business by master, managing owner and other parties holding the relation of agent to such vessel owners is a settled principle of American and English law.

Hughes, Admiralty, p. 298.

The decree was ordered and made against each respondent severally for his proportionate share in the vessel, the court applying the act of June 26, 1884, sec. 18 (6 Fed. Stat. Ann. 368). Section 18 reads as follows:

> "That the individual liability of a ship owner shall be limited to the proportion of any or all debts and liabilities that his individual share of the vessel bears to the whole."

Appellants contend that the decree should have been made against the respondents *jointly* and *severally* for the full amount awarded to libelants, and not severally against each.

The Supreme Court, in *Richardson v. Harmon,* 222 U. S. 96, decided that, under this section, each part owner is still liable in toto for his own fault and neglect. *Prima facie* each respondent is liable as a tortfeasor for the whole amount of the damages. The limitation applies only to cases of loss and injury caused without the fault of the particular respondent. Each particular respondent claiming the limitation must first show that he was not personally at fault in failing to provide the slings which were not long enough for a double

turn, a failure which the court has found to be negligence. None of the respondents have made such a showing, but, as will be hereafter seen, the evidence connects two of them directly with the negligence which caused the death of deceased.

Fourth: Assuming that Each of the Respondents Against Whom the Decree was Rendered had Shown Himself Entitled to the Limitation of Section 18, the Decree Should Be Against Each Individually for that Proportion of the Full Amount of the Damages Which His Individual Share in the Vessel Bears to the Whole of the Shares Liable.

The decree of the court below was, in the aggregate, for 37/64 of the award, the owners of the remaining 27/64 having died since the commencement of the action. The decree made against the owner of a 1/32 part of the schooner was for 1/32 of the liability of respondents. Libelants contend that, following this doctrine, 37/64 are required to pay $6500; therefore, each respondent owning 1/32 (being equal to 2/64) should pay 2/37 of $6500 or $351.35, instead of $203.12, as the decree adjudges.

Fifth: If Not Against All the Respondents, then at Least Against E. A. Christenson, Managing Owner, and Hans J. Lungvaldt, Master of the Schooner, the Decree Should Be for the Full Amount of the Damages Awarded to the Libelants, Without Limitation.

If the first award of the court below be affirmed, the decree against each of these particular respondents should be for $10,000; if the assumed contributory negligence of the deceased is eliminated by this court, the

decree against each of these respondents should be for $20,000; if the second award were affirmed, the decree against each of these respondents should be for $6500; and if, on the basis of the second award, the assumed contributory negligence of the deceased is eliminated, the decree should be against each of these respondents for $13,000, for the following reasons:

The court below decided that the failure to provide slings long enough for a double turn constituted negligence. If this failure is due to the personal act or neglect of these respondents, they at least cannot claim the benefit of any statute limiting their liability.

A. The master.

As to respondent, Hans J. Lunvaldt, who was the master of the schooner at the time of her discharge, and who testified as an eyewitness of the accident, the testimony shows that the slings for the discharge of the lumber were provided by him.

> "Q. By whom were the slings provided which you used in making the loads? A. The captain.
> Q. How do you know they were provided by the captain?
> A. Because the mate told me, when they were making the slings, he told the captain 'they were too short'" (*Ehlert,* 75).
> "Q. Did you know the master of the vessel while the discharging was going on, Mr. Woodson? * * *
> A. Well, I saw him there, yes.
> Q. Did you speak to him about the kind of slings and ask him to use different slings?
> A. No, sir; I did not, but Mr. Butler did.
> Q. Who is Mr. Butler? A. He is foreman of the yard.

Mr. Frank. Q. Did you hear Mr. Butler say it?
A. Yes, sir. * * *
Q. What did he say to the captain?
A. He told him not to use those slings; they were too short.
Q. Did you hear what the captain said in reply?
A. The captain said that is all the slings that he had'' (Woodson, 149, 150).

The evidence shows that the name of the foreman of the yard who remonstrated with the captain was not Butler, but Buckley. He had 21 years' experience in this business and proved a careful and impartial witness when his deposition was taken by libelants. He testified:

''I saw what they were doing—making one turn —and I asked them to make the second turn or get chain slings.
Q. Who did you ask that?
A. Either the master or the mate—this is so long ago it has gotten out of my head, but I asked some one there—the mate or the captain. Well, they told me the sling was not long enough; I had them try it and it would not go around the load when they first started. * * *
Q. And you did not want to get your men hurt on the wharf?
A. That's what I told the mate or captain.
Q. What did they say?
A. They tried to get it around, but it would not reach and then *they used one turn*'' (*Buckley*, 132).

The master testified, when questioned by his counsel:

''Q. Did Mr. Buckley, or anybody else, come to you and make any protest about using a single turn rope? A. No, sir; no, sir'' (181).

It will be noted that he *did not* testify that he did not know that the discharge was made in the manner

found to constitute negligence on his part, he being one of the owners. He did testify, however, that

> "If I was sending up a load of large number, I would use a *single turn*. On that kind of lumber, it is not necessary to use a double turn. * * * This was just one single turn, with about 18 or 20 pieces in it. It was only necessary to put one turn around it. In that kind of load they will make them single because they can load them so much easier in the truck; * * * they never slide out; they jam up together" (183).

It thus appears by his own testimony that his judgment did not agree with the conclusion of the court below that this method, approved by this part-owner and respondent, constitutes negligence. His testimony shows clearly that this part-owner and respondent, at least, *did* know the method of discharge by the inadequate slings, and approved of it. Under these circumstances the protest of Mr. Buckley was naturally of no effect. We ask this court to find that the protest was in fact made. One witness so testified positively; another witness testified that he protested either to this respondent or to the mate; the respondent himself, while he denies that the protest was made to him, indicates clearly by his testimony that it would not have been heeded if it had been made.

The personal negligence of this respondent in providing, as master of the vessel, inadequate slings and in sanctioning a mode of discharge which the court has found to constitute negligence, was the direct cause of the accident.

The law is that part-owners of a vessel, personally negligent, cannot claim the exemption of the statute of limitation of liability at all. The statute does not displace the liability of a shipowner for a loss caused by his own negligence.

Hughes, Admiralty, p. 321;
The Republic, 61 Fed. 109 (C. C. A. 2nd Cir., 1894);
Rudolf v. Brown, 137 Fed. 106.

B. The managing owner.

The same argument applies (perhaps with less force, but with sufficient cogency) to the case of the managing owner. It was "the non-delegable duty" of all respondents, as the court held, "to take reasonable care in providing safe appliances for carrying on the work." The court has found that inadequate appliances were provided, and that the failure to provide adequate appliances caused the death of deceased. In addition to this, the evidence on the part of respondents does not only fail to show that safe slings and a safe contrivance to keep the loads from swinging back from the wharf to the ship (which contrivance would have prevented the death of deceased) were in fact provided; but their evidence shows boldly and ostentatiously that no such contrivance or equipment was in fact provided, for the reason that it was not considered necessary. Whether it be named a "Spanish burton" or be given any other name, reason, and, indeed, common sense would persuade any open mind that the failure to prevent a heavy load from swinging back to the vessel was an unneces-

sary and avoidable extra hazard, and that the life of the deceased would have been saved, had the ship provided some contrivance to prevent it.

The *normal* and personal duties of the managing owner of a vessel include the duty

> "(1) to see to the proper outfit of the vessel, in the repairs adequate to the voyage, and in the tackle and furniture necessary for a seaworthy ship;
> (2) to have a proper master, mate and crew for the ship, so that in this respect it shall be seaworthy."
>
> *Hughes, Admiralty,* p. 298, citing Bell's Commentaries.

Unquestionably it was the duty of Mr. E. A. Christenson, respondent, to provide adequate slings for the discharge of this lumber vessel.

In order to gain the benefit of the limitation of liability under section 18, it was incumbent upon him to show that the accident and consequent damage in the instant case was incurred without any fault or negligence, on his part, in the furnishing of the adequate discharging slings, and other safe equipment of the vessel, and that the fault and negligence shown in the use of the improper equipment was not due to any fault or negligence on his part. There is no such evidence in the case, and he is not, therefore, entitled to a decree for the limited amount.

The decree against E. A. Christenson, managing owner, should therefore be for the full amount of the damages awarded.

CONCLUSION.

We do not contend that all the points raised by this appeal are of equal force; we know that some involve matters of judgment, on which there may be reasonable doubt. We think, however, that conflicting arguments of similar weight should be resolved against the respondents irrevocably charged with negligence, and in favor of the widow whose long and unequal struggle to furnish bread and an education for her growing children was caused by the negligence of respondents.

We feel keenly that the charge of contributory negligence against the husband and father killed in the performance of his duties to respondents is harsh, cruel, and without foundation in fact, and that this court should, and will under the evidence, eliminate it from this case.

Whether the life of this faithful man was worth $20,000, as Judge Dietrich first found, or whether it was worth only $13,000, as he later concluded, without further evidence on the subject—that, indeed, is a matter of judgment, upon which there is room for wide difference among reasonable men. We believe that, had Judge Dietrich not been embarrassed by lack of time before his return to his own jurisdiction, he would have been persuaded that adherence to his original conclusion would have been in consonance with principles of justice and his own real inclination. But whether this court awards the larger, or the smaller sum, the award should be decreed for the full amount, in solido, against all the respondents, they not having shown that they are entitled to any limitation, or at least for the full

amount against the two respondents, E. A. Christenson and Hans J. Lunvaldt. Such a decree would be doubly justified against respondent Lunvalt, who, as a witness, told the court that he had "no interest whatsoever" in this case.

The present decree is a hollow comfort. If Mrs. Flynn has to collect these small sums from various respondents whose whereabout are unknown to her and who may be unwilling or unable to pay the respective judgments against them, the award of the court may prove to be a new source of trouble and expense to the widow who spent a large part of her life in a struggle for the existence of her family, which would have been spared to her but for the negligence of respondents.

Dated, San Francisco,
October 9, 1920.

Respectfully submitted,

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